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# Advertising Law and Product Liability

Robert B. Dunsmore

# *Advertised-Product Liability:*
## *Advertising Law and Product Liability*

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PERHAPS A QUICK LOOK AT THE ADVERTISING INDUSTRY will better enable us to form an opinion about the real merits of the liability imposed on a manufacturer as a result of representations made in his advertising.[1]

### Overall View of Advertising Industry

Advertising is by no means a creation of modern times. It was fairly wide-spread in the English-speaking world three centuries ago. In 1660 these familiar assertions appeared in a British weekly: "Most Excellent and Approved Dentrifice to Scour and Cleanse the Teeth, Making Them White as Ivory; Preserves from Tooth-ache, It Fastens the Teeth, Sweetens the Breath, and Preserves the Gums and Mouth from Cankers and Imposthumes . . ."[2]

The ancestors of the modern advertising agency began to appear in this country around 1800. Initially, newspapers appointed stationers, booksellers, or even postmasters to collect and forward advertisements with a small commission for the job. By the 1830's, there were advertising agents devoting free time to the job, and about this time, some of them broadened their spheres of operations and began serving many newspapers simultaneously. Around the 1850's, the agents began severing their loyalties to newspapers and struck out on their own. They characteristically sold advertising to merchants and businessmen, then bought space to fill the orders. By the time of the Civil War, the order of these transactions was commonly reversed, i.e., the agencies bought space of their own, and assumed the risk of reselling it. This brokerage operation expanded steadily during the remainder of the nineteenth century. For a considerable period of time, some "space merchants" resumed their position as formal agents of the newspapers; they regularly disposed of all or part of the various papers' advertising space.

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[1] See, Fortune, The Amazing Advertising Business (1957).

[2] Id, at ix,

No very exact date can be put on the time when agencies began to regard the advertisers, rather than the newspapers, as their real customers. This development occurred over a period of several decades in the latter part of the nineteenth century, and it was fostered by the growing demand of advertisers for more service from the agencies, especially for more help in the preparation of ads. Just who were the first copywriters and art directors is a question impossible to answer today.

In 1955 there were some 3300 advertising agencies employing about 45,000 people; of these four major companies[3] did fourteen percent of the business while the top twenty-five did thirty-six percent of it. The total spent in national advertising expenditures in 1955 was 5.3 billion dollars; in 1956 close to six billion.[4]

The total annual volume of advertising in the United States, national and local, is running close to ten billion dollars, just about triple the 1946 figure.[5] In 1957 there were nineteen companies[6] which spent over ten million dollars each for advertising their products and services, and there were over a hundred companies that spent two million each or more. Gross advertising revenue for the three TV networks, magazine, and Sunday magazine sections reached an all time high of 1,368,322,511 dollars.[7] An industry break-down of expenditures follows: [8]

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[3] Id. at 94. The big four being Thompson; Young & Rubicam; McCann-Erickson; and Batten, Barton, Durstine & Osborn.

[4] Id. at 84.

[5] Id. at 81. According to Jones, Law of Journalism, 298, the figure was near the two billion dollar mark in 1940.

[6] The top ten advertisers were:

| | |
|---|---|
| Procter & Gamble | $57,191,511 |
| General Motors | 41,834,224 |
| Chrysler | 30,945,944 |
| Colgate-Palmolive-Peet | 29,078,118 |
| Ford | 28,082,142 |
| General Foods | 28,061,402 |
| Lever Bros. | 23,565,993 |
| American Home Products | 22,431,011 |
| Bristol-Myers | 19,503,362 |
| R. J. Reynolds | 19,159,901 |

[7] 2 National Advertising Investments 7 (1957).

[8] Ibid.

**Industry Expenditure in Three Media: General and National Farm Magazines, Sunday Magazine Sections, and Network Television**

| | 1957 | 1956 | 1955 |
|---|---|---|---|
| Food and Food Products | $204,203,569 | $188,281,965 | $176,059,421 |
| Toiletries and Toilet Goods | 159,067,661 | 139,330,634 | 127,191,376 |
| Automotive, Automotive Accessories and Equipment | 125,856,466 | 128,884,067 | 114,418,384 |
| Soaps, Cleaners, Polishes | 87,816,337 | 77,543,801 | 61,606,152 |
| Drugs and Remedies | 83,057,303 | 68,576,176 | 49,194,915 |
| Smoking Materials | 79,087,401 | 61,005,285 | 62,994,214 |
| Industrial Materials | 73,158,866 | 71,074,231 | 57,389,303 |
| Apparel, Footwear and Accessories | 63,442,225 | 63,884,789 | 59,297,784 |
| Household Equipment and Supplies | 62,625,942 | 80,543,532 | 74,092,540 |
| Beer, Wine and Liquor | 49,847,339 | 40,444,330 | 43,037,915 |

Radio and television, of course, have done much to increase the advertising volume in the past few decades. The number of people that can be reached now by one television commercial was almost unheard of ten years ago.[9] In viewing these statistics, it is not surprising that people are brand conscious. And in the above summary no statistics are provided for small newspaper and magazine advertising, local radio, directories, and many other media wielding great total effect.

In 1905, the Associated Advertising Clubs of America was formed and in 1929 the organization became the Advertising Federation of America, the National Association of Better Business Bureaus being affiliated with it.[10] Some of the flagrant misuses of advertising, which organized advertising is fighting to abate, may be listed as follows: [11]

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[9] ARB Network TV Ratings for the Week of Jan. 5-11, 1958

| | | Total viewers reached |
|---|---|---|
| 1. Gunsmoke | Liggett & Myers, Sperry Rand, CBS | 51,290,000 |
| 2. Perry Como | Several sponsors, NBC | 50,670,000 |
| 3. Steve Allen | Several sponsors, NBC | 42,920,000 |
| 4. Tales of Wells Fargo | American Tobacco, Buick, NBC | 39,390,000 |
| 5. Have Gun, Will Travel | Whitehall, Lever, CBS | 38,470,000 |
| 6. Wyatt Earp | General Mills, Procter & Gamble, ABC | 37,260,000 |
| 7. General Electric Theater | General Electric, CBS | 36,950,000 |
| 8. Wagon Train | Several sponsors, NBC | 36,930,000 |
| 9. Lassie | Campbell Soups, CBS | 36,230,000 |
| 10. Father Knows Best | Scott Paper, Lever, NBC | 36,160,000 |

[10] Kenner, Fight for Truth in Advertising 18 (1931).

[11] Id. at xvii-xviii. As to some of the bad practices in the advertising business itself, see, Oleck, Watch Out For Ad Rackets, 86 American Mercury (408) 89 (Jan., 1958).

1. Misleading statements, insinuations, exaggerations, and illustrations that give impressions of value, quality or service not inherent in the product.
2. Suggestions of cures and palliatives, and lures of beauty and health building, not founded on scientific fact.
3. Part-truths of scientific information that imply a benefit not supported by science.
4. Indecent copy, and pictures that violate privacy.
5. Testimonials that are not honest or honorable in their implications.
6. Comparative prices that are exaggerated or misleading.
7. Predatory price cutting and the use of "baits" to mislead the public.
8. Claims of general underselling not capable of proof and untrue in their insinuations and impressions.
9. Unfair attacks, actual or implied, on competitors or competing products.

In 1929, Milton Handler discussed some of the deceptive advertisement problems prevalent then, and made some criticism and suggestions concerning these problems.[12] He pointed out that it was the modern temper to turn to the law for the solution of pressing social problems, but whether the solution to the problem of false advertising was thus to be found, he was unable to say. However, he did think that much could be accomplished by the legal devices then available. The devices mentioned were grouped as follows: (1) civil action available to the party aggrieved; (2) proceedings in which the state is a party; (3) sanction of various kinds which indirectly tend to discourage false advertising.

He summed up the discussion of group (1) by writing that it was apparent that the traditional actions of deceit and warranty as developed by the courts could be of little utility in a campaign against false advertising. The difficulties of group (1) are discussed in the history of negligence and warranty in the preceding pages of this Symposium. As to the second and third groups, we still have the same organizations and the same fruitless attempts by the state and federal agencies set up to police this area.

Handler bemoaned the influence of the friendly doctrine of "seller's puffing" to shield the advertiser from liability. He suggested that if such statements as, "These second hand tires are as

[12] Handler, False and Misleading Advertising, 34 Yale L. J. 22 (1929).

good as new," [13] "This suit of clothes will wear like iron," [14] "We are in a position to guarantee them to be all that is claimed for them, perfect of their kind," [15] or "This article will give first class satisfaction, it is the best upon the market, it will sell like hot-cakes and will be the best drawing card ever handled," [16] are to be regarded as puffs, then all the copywriter has to do is to give free rein to his fancy and avoid conveying any useful information about the article.

Finally, he applauded the steps toward regulation by the Federal Trade Commission and other governmental agencies, but drew the conclusion that in spite of all the then-existing legal devices, false advertising would not be materially abated until a new business psychology was born, with regard for the truth and aversion for falsity, plus further education of the public to demand useful and truthful information. Here was a task for the educator and missionary, an opportunity for the trade association; the lawyer could do little." [17] His pessimism was well-founded—proved by many a blatant or tricky ad "pitch" today, almost thirty years later.

## Governmental Regulation

The attempts by government regulators to control false advertising are headed by the Postal Regulations, the Federal Alcohol Administration, the Federal Food and Drug Administration, and the Federal Trade Commission.

The agency which exercises the most control over advertising is the F. T. C.[18] Originally, it was established to determine whether an advertisement or representation amounted to unfair competition, a tendency to mislead, irrespective of intent, and a probable diversion of trade. Its aim was to protect the competitor. However, the courts have since construed the act creating the F. T. C. to be designed to prevent the purchaser from being

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[13] Warren v. Walter Auto Co., 50 Misc. 605, 99 N. Y. Supp. 396 (1906).

[14] Harburger v. Stern Bros., 189 N. Y. Supp. 74 (Sup. Ct., 1921).

[15] League Cycle Co. v. Abrahams, 27 Misc. 548, 58 N. Y. Supp. 306 (Sup. Ct., 1899).

[16] Detroit Vapor Stove Co. v. Weetel Lumber Co., 61 Utah 503, 215 P. 905 (1923).

[17] Handler, op. cit., n. 12, at 29.

[18] 10 Advertising Age 35 (August 28, 1939).

defrauded.[19] In 1938, the passage of the Wheeler-Lea Act[20] signified that Congress approved the F. T. C.'s belief that direct protection of the consumer from deceptive advertising was as equally important as that of the preservation of competitors.

In 1911, the Printer's Ink Publishing Co., Inc. sponsored the Printer's Ink Statute.[21] This was adopted by the majority of the states and is the most comprehensive of the state laws regulating dishonest or misleading advertising. The statute imposes criminal penalties for violations, prohibits untrue, deceptive, or misleading advertising of products, services, property, or securities. It preceded by three years the enactment by Congress of the Federal Trade Commission Act designed to bar unfair methods of competition in interstate commerce. (See Table 3.)

There has been a feeling in some quarters that the Printer's Ink Statute would have received a greater degree of enforcement if it had provided an alternative injunction feature to take the place of the present criminal penalty. *Printer's Ink* drafted a simple injunction clause and, while not affirmatively advocating its adoption, has made the alternate provision available to those states desiring it.[22] (See Table 3.)

In 1940 the executive committee of the Association of Food and Drug Officers of the United States endorsed a model bill, for enactment by the various states, that closely paralleled the federal law of the 1938 which amended the 1906 act by including cosmetics.[23] (See Table 1.)

There are also many statutes governing advertising of other commodities, e.g., animal feed, alcohol, fertilizer, etc. (See Table 2.)

The consumer movements have also had their effect by educating the public, the most noticeable being *Consumer's Research* and *Consumer's Guide,* both of which make recommendations as to what products are acceptable and live up to their claims.

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[19] F. T. C. v. Regal Milling Co., 228 U. S. 212, 217 (1933).

[20] 52 Stat. 114, 15 U. S. C. A. Supp. IV & V (1938).

[21] Digges, The Modern Law of Advertising and Marketing 47 (1940). See also, Kallet, Counterfeit 26 (1935); Printers Ink 80 (August 16, 1957); Id., at 83 (August 23, 1957); Printers Ink 16 (February 21, 1958); Advertising Age 89 (February 10, 1958); Id., at 143 (September 19, 1957); Id., at 119 (August 21, 1957); Geller, Advertising at the Crossroads, 258-259 (1952).

[22] Ibid.

[23] States which have adopted this model bill: Arkansas, California, Connecticut, Florida, Indiana, Louisiana, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, Vermont, Washington, West Virginia, Wyoming.

## Questionnaire to Advertising Agencies

In an attempt to find out just what the reaction of the advertising agencies is to the doctrine of liability as laid down by the *Toni* case, the subjoined questionnaire was sent to one hundred and twenty of the leading advertising agencies in the United States. Fifty-four replies were received and some of the results are tabulated within the questionnaire.

> "An express warranty is an affirmation of fact by the seller as to a product or commodity to induce the purchase thereof, on which affirmation the buyer relies in making the purchase.
>
> Under modern merchandising practice, where the manufacturer of a product in his advertising makes representations as to the quality and merit of the product aimed directly at the ultimate consumer and urges the latter to purchase the product from a retailer, and such ultimate consumer does so in reliance on and pursuant to the inducements of the manufacturer and suffers harm in the use of such product by reason of deleterious ingredients therein, such ultimate consumer may maintain an action for damages immediately against the manufacturer on the basis of express warranty, notwithstanding that there is no direct contractual relationship between them." [24]

"1. Since this decision presently applies only to Ohio and a few other jurisdictions, does it affect your present advertising policies? Yes *5* No *44*
If so, How? (For example, what media, etc.) (Majority answer was that little effect was felt.)

"2. If this ruling should become the law in the majority of jurisdictions, how will it affect your future advertising policies (Majority answer was "Not at all.")

"3. Do you believe this decision will unduly restrict advertising claims? Yes *8* No *40*
Is it possible such a decision on a nation-wide scale would eliminate (or reduce) "puffing"? Yes *16* No *28*

"4. What is your opinion of the decision? Any comments are welcome."

Since by far the majority of those answering Question 1 felt that the *Toni* decision would not affect their present advertising policies, the answers to this question were, in general, quite brief. One commendable comment was:

> It is our policy to submit for publication advertising copy that is factually correct. So strongly have we felt on this subject, we have lost advertising accounts rather than produce copy which is false. This applies to all media.

[24] Rogers v. Toni Home Permanent Co., 105 Ohio App. 53 (1957), affd. 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

In question two, the majority of the replies stated flatly that it would not affect them at all. However, one claimed that although it would not affect him, it might affect others. Others thought it might force more careful study of advertising claims: one stated that it would require making doubly sure that the product justified all claims and had no harmful ingredients; another that they would have to make sure that the product lived up to the manufacturer's claims. Only one felt that the decision would affect his advertising materially if it became the law in the majority of the jurisdictions. Several mentioned that they would have the legal aspects of their advertisements checked more closely before using them, one saying: "The majority of our copy is now OK'd by the client's lawyer; we would tighten up to make sure all copy is reviewed." Still another said: "It might serve as a restraining force on overly enthusiastic copywriters, but any reputable agency should warn its clients against extravagant claims which might involve them in legal actions." It is interesting to note that only a few of the agencies honestly admitted that their copy sometimes oversteps the actual facts upon which the advertisements should be based. The majority seemed to feel that although their copy was honest, at least some of the other agencies would meet trouble as a result of the decision, and would have to alter their policies.

The answers to the first part of question 3 were generally quite brief. Typical comments were: "Restrict, yes, unduly, no"; "Not wrongfully restrictive"; or "It could, depending on the outcome of test cases." One thought it definitely would restrict the advertising of "companies who overstate or exaggerate the claims for their products"; and another said it definitely would restrict those "with certain types of products, such as cigarettes."

The second part of question 3 evoked much more comment than any of the preceding questions. In addition to the "yes" and "no" answers, many explained their reasoning, one stating that "since no reputable advertising agency will make claims that cannot be proven, the question is of the 'Have-you-stopped-beating-your-wife?-Answer-yes-or-no-' type." Several definitions of puffing were received, such as "true puffing is non-specific," or that puffery is merely a distinct kind of statement which will be understood by the public as representing the natural enthusiasm of the seller. In discussing their answers, such statements as "There is always a way around for the unscrupulous," and "It is my judgment that it will continue with those who practice

stretching the truth" were made. Many thought it might reduce, but that it certainly would not eliminate it. One commented:

> Perhaps in the purely legal sense, but not in the commercial use of the term. So many claims, such as best, most soothing, longest lasting, etc., cannot be proved or disproved except arbitrarily. As long as they cause no harm they would or could not be stopped by legislation unless it were given a very broad interpretation.

And still another felt that "good advertising puffery should not be restricted under such legislation."

As to question 4, several were vociferously opposed to the decision. It was thought by one to be a restrictive, negative approach to the matter. Another thought it to be limiting and unreasonable and that it was seldom possible in advertising to give the detail necessary to create a clear warranty. While one advised that the F. T. C. and F. D. A. already control the situation with adequate policing power (a questionable "fact," but even if true, it is apparent that these powers are insufficiently used), another expressed his faith in the F. T. C. and credited the B. B. B. in the various cities with keeping advertising honest; he further remarked that he believed the present laws gave the consumer adequate protection and voiced his opinion that practically all advertisers are honest in their advertising and in the manufacturing of their products. Another said that most manufacturers do not intend to put a bad product on the market, but on the very few occasions when it did happen, everyone made broad, sweeping statements which did harm to everyone and that the statements served no good purpose; any legislation beyond what we already have seemed unnecessary and a waste. Roget's Thesaurus was apparently used by the person who thought it "crazy, legalistic, over-cautious, unrealistic, stultifying, incomprehensible, comparatively miniscule in potential application because no manufacturer of substance (sue-able) will deliberately continue to manufacture a harmful product. It is just another silly attempt to legislate morals;" he also suggested a law on compulsory Christianity. And still another referred to the reports of the F. T. C. which found in thousands of advertisements examined only a fraction of one percent worthy of desist orders. He further advised that our approach was somewhat offensive to him personally and to his profession. As research director of his agency he "watch dogged" clients' claims to make sure that they did not misrepresent. He also made it clear that one cannot build

a business on falsehood or bad goods. He ended with this statement: "I could draft a similar questionnaire about lawyers with yes and no fill-ins that as evidence would de-bar you."

The majority of the replies, however, were favorable to the decision. Thus, it was thought to be "a good decision based on moral behavior. I can't see how it would possibly harm anyone honest;" "a good decision, manufacturers should stand back of their products;" "Sound, all manufacturers should be irrevocably bound by their warranty and advertising claim and assurances." Another said that if it tends to curtail untrue or exaggerated advertising—it will serve a very useful purpose. Other comments: "good—will make claims agree with facts"; "the decision is a very good one. Most advertisers and agencies welcome it and will be unaffected by it because it will concern only that fringe group of questionable advertisements. It will weed out the undesirables which is to everyone's benefit." Still another believed it to be justified and that the manufacturer should clearly indicate or warn against any possible harmful effects. The opinion was also expressed that "the decision is sound on the privity point and is no surprise. All fictions eventually give way." However, there is "the danger that liability may be found even though the label provides all appropriate disclosures and warnings," and that "in such a case the injured party should not prevail because of his own contributory negligence." One commented generally, saying:

> It is a good decision if justly and intelligently enforced. There is too much hypocrisy and exaggerated claims in advertising. Truth in advertising has always been a part of true success. It's ironic that law must step in to make truth essential, but maybe it's high time.

Summarizing, he continued:

> Basically, I don't like to see the law step in to correct a condition that advertisers and their agencies should be eager to correct themselves. The facts remain, however, that they haven't been able to correct it . . . nor, in many instances, willing to do so.
>
> Advertising has made big strides in correcting many of its earlier abuses, and many advertisers and agencies have long recognized the impact of truth and restraint. Unfortunately, these advertisers and agencies suffer from the falsehoods, puffery and hypocrisy of the others, and the impact of advertising is being impaired by a minority.

So it is that a respected member of the advertising profession himself refutes many, if not all, of the arguments expressed by

those opposed to the decision, and points out, in a frank appraisal of the advertising business, the necessity for such restraints as those advocated in this article.

## Absolute Liability

From the foregoing, it is obvious that there have been a great many attempts to police the advertising of products and to protect the public from fraudulent and misleading claims. It is equally apparent from the numerous TV commercials, magazine and other advertisements that government regulations and consumer attempts at control are definitely inadequate.

The F. T. C. cease and desist orders and the post office stop orders can affect only future advertising. In the meantime, the advertiser has already put across the point which he wished to make, to as many as fifty million people in one week.[25] The slap on the wrist he receives from the F. T. C. or the Post Office Department has no real deterrent value in stopping others from attempting the same thing, or indeed in stopping the same person from trying again under another name or with another product.[26]

In the first six months of 1958, the number of complaints received by the Better Business Bureaus on misleading advertising increased 30% over the corresponding period of 1957.[27] Perhaps this was due to the status of the general economy during those months, as there is invariably a sharp rise in unethical advertising and selling practice during recession periods. Borderline firms will stoop to almost anything to "make a fast buck." Moreover, even some ethical companies are tempted to resort to unsound practice in competition for the consumer dollar. The most flagrant misrepresentations uncovered by the Better Business Bureau in recent months have been the persistent uses of bait advertising, whereby a dealer will advertise a non-existent automobile, for

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[25] Supra n. 9.

[26] Some of the companies involved and their products which are currently under Post Office stop orders are: Brochim Company, N. Y., "Royaljel Capsules" (restoration of sex virility in men, restoration of youthful sex functions in women, rejuvenation of failing or worn-out glandular activities in humans); Nature Food Centres, Cambridge, Mass., "Bu-Royale Capsules" (increase of life span); Owen Laboratories, Chicago, "Enerjol Capsules" (normalization of growth in underdeveloped children); U. S. Bio-Genics Corp., N. Y., "Royljel Formula 101" (cure for low blood pressure and a variety of other conditions); Rojelle Pharmacal Co., Chicago, "Rojilan Formula 66 Capsules" (providing an anti-aging effect, restoration of youth and vigor).

[27] B. B. B. Spotlight, N. Y. C., 1 (July 1958).

example, or an automobile he has no intention of selling, in order to get the buying public to come to his lot. Others frequently used are the fictitious price, the false fire sale, etc.[28]

There are examples of absolute liability in our statutes and our common law which have been accepted and applauded, such as the Unemployment Compensation Acts and the liability of the common carrier and innkeeper. The philosophy has been developing, for many years, that compensation should be recovered when a person receives injuries due to a defective product; and thus recovery has become increasingly easier to obtain from the manufacturer.[29]

So also the need to hold a manufacturer liable for his false and misleading advertising has long been recognized, and here too, recovery has become increasingly easier.

Certain types of advertisements have been held to be binding offers to sell. Generally speaking, an advertisement may be binding when it contains specific facts that require no further negotiations regarding price, quantity, quality, delivery, etc.[30] Advertisements omitting details of this nature are in most instances merely invitations to trade and are not binding.[31]

In Baton Rouge, Louisiana, an automobile dealer placed the following advertisement in a local newspaper: "Two for one. Buy a '54 Ford now. Trade even for a '55. When the 1955 Models come out, will trade even for your '54."

A customer read this advertisement and bought a 1954 Ford sedan. When the '55 models were advertised for sale, he offered to return the car he had purchased in exchange for the new model. He was informed that the advertisement was not an offer but an invitation to "come in and bargain." The customer sued to recover judgment against the dealer for the difference between the value of the car he had bought and the one the dealer had advertised that he would deliver. "Such an acceptance of an offer," said the court, "makes a valid and binding contract. The advertiser was bound by the offer he made in exchange for the act which the buyer performed." [32]

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[28] Simon, The Law for Advertising and Marketing (1956).

[29] Condron, Product Liability, 23 Insur. Counsel J. 176 (1956).

[30] R. E. Cummer & Co. v. Nuveen, 147 F. 2d 3, 157 A. L. R. 739 (7th Cir., 1945).

[31] Nebraska Seed Co. v. Hirsh, 98 Neb. 89, 152 N. W. 310 (1915).

[32] Johnson v. Capital Ford City Co., 85 S. 2d 75 (La., 1955).

Again, in *Lefkovitz v. Great Minneapolis Surplus Store,* [33] a merchant advertised three fur coats for sale at one dollar each, on a "first come first serve" basis. The first customer to arrive offered one dollar and demanded a fur coat. The merchant refused to deliver it, and the customer sued. The merchant contended in court that his advertised offer could be withdrawn at any time. The court awarded judgment to the customer for the value of the coat. The court held that the test whether an advertisement is an offer or merely an invitation to trade is "whether the facts show that some performance was promised in positive terms in return for something requested. . . . The advertisement was a definite offer and became a binding contract when the customer offered the one dollar to the dealer and asked for the coat. The offer was clear, definite and explicit." [34]

The results of a series of tests by the Better Business Bureaus, to compare the list price and actual selling price in the electrical appliance field, led Robert Parrise, Secretary of the F. T. C., to contend that many manufacturers' list prices are just so much fiction. He said: "The Commission has found that the public believes the term 'list price' to be the usual and ordinary retail price of such an article and that any dealings by which a price reduction is obtained below such list price represents savings from regular retail prices. . . . It is up to the responsible manufacturer and dealer to see to it that the public's belief and confidence in advertising is not destroyed by the continual use of fictitious list prices and phony pre-ticketing." [35]

Although there have been no test cases on the fictitious list price, there have been a number where determination of whether the advertisement was misleading or not was the principal question.[36] The F. T. C. requires that the advertisement be tested in the atmosphere and under the circumstances in which it is intended to be used.[37] The F. T. C. is deemed to be expert in dealing with these matters and thus is entitled to draw upon its own

[33] 56 N. W. 2d 689 (Minn., 1957).

[34] Id. at 691. See also Oliver v. Henley, 21 S. W. 2d 576 (Tex. App. 1929); Montgomery Ward & Co. v. Johnson, 209 Mass. 89, 95 N. E. 290 (1911).

[35] B. B. B. Periodical, Philadelphia, 2 (August 1957).

[36] Alberty v. F. T. C., 118 F. 2d 669 (9th Cir., 1941); Rhodes Pharmacal Co., Inc., v. F. T. C., 208 F. 2d 382 (7th Cir., 1953); Thomas Quilt Factories v F. T. C., 116 F. 2d 347 (10th Cir., 1940). Also see cases collected 2 C. C. H., Par. 5095.80.

[37] F. T. C. v. National Health Aids, Inc., 108 F. Supp. 340 (D. C. Md., 1952). For tests of false and misleading advertising, see Do's and Don'ts in Advertising Copy, published by the National Better Business Bureau.

experience in order to determine, in the absence of consumer testimony, the nature and probable result of the use of advertising expressions.[38] It is not required to sample public opinion in order to determine what meaning is conveyed to the public by the particular advertisements.[39]

The important criterion in determining whether a product is falsely advertised is the impression which the advertisement is likely to make on the general populace.[40] Since the law is not made for the protection of experts, but for the public—which includes "the ignorant, the unthinking, etc." [41]—an advertisement may be technically truthful but still be misleading.[42] The advertisement must also be considered as a whole, and those which are capable of two meanings, one of which is false, are considered misleading.[43]

Thus it is that there is a growing body of law, and a group of experts, deemed capable of determining whether or not an advertisement is false and misleading. Although the courts have granted recovery upon a claim of negligent advertising in a few instances in the past,[44] *Rogers v. Toni Home Permanent Co.*[45] is one of the first cases to place liability squarely on the manufacturer, for the protection of the innocent purchaser who buys in reliance on the manufacturer's advertised claims. It would seem only logical that the body of experts and even much of the law, as illustrated above, could be utilized in civil actions, so that a manufacturer could be held liable for his false claims for a product that injures its user.

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[38] F. T. C. v. R. F. Keppel & Bros., Inc., 291 U. S. 304, 54 S. Ct. 423, 78 L. Ed. 814 (1934).

[39] Zenith Radio Corp. v. F. T. C., 143 F. 2d 29 (7th Cir., 1944).

[40] Charles of the Ritz Dist. Corp. v. F. T. C., 143 F. 2d 676 (2d Cir., 1944); P. Lorillard Co. v. F. T. C., 186 F. 2d 52 (2d Cir., 1950).

[41] Florence Manufacturing Co. v. J. C. Dowd & Co., 178 F. 73, 75 (2d Cir., 1910). And for other cases describing the public, see 2 C. C. H., Par. 5081.

[42] Ford Motor Co. v. F. T. C., 120 F. 2d 175 (7th Cir., 1941). Cf., Consolidated Book Publishers v. F. T. C., 53 F. 2d 942 (7th Cir., 1931).

[43] U. S. v. 95 Barrels of Vinegar, 265 U. S. 438, 44 S. Ct. 529, 68 L. Ed. 1094 (1924). Cf., C. Howard Hunt Pen Co. v. F. T. C., 197 F. 2d 273 (3rd Cir., 1952).

[44] Wright v. Carter Products Co., 244 F. 2d 53 (2d Cir., 1957); Crist v. Art Metal Works, 230 App. Div. 114, 243 N. Y. S. 496 (1930) (absolutely harmless toy gun); Henry v. Crook, 202 App. Div. 19, 195 N. Y. S. 642 (1922) (harmless sparklers); Rosenbush v. Ambrosia Milk Corp., 181 App. Div. 96, 168 N. Y. S. 505 (1917) (absolutely safe drink); Marsh v. Usk Hardware Co., 73 Wash. 543, 132 P. 241 (1913) (absolutely safe explosion). Cf., E. I. DuPont de Nemours & Co. v. Baridon, 13 F. 2d 26 (8th Cir., 1934).

[45] 105 Ohio App. 53 (1957); aff'd. 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

TABLE 1. STATUTES GOVERNING ADVERTISING OF FOODS, DRUGS AND COSMETICS

| | *Pure Food, Drug & Cosmetic Statutes* | *Oleomargarine & Other Butter Substitutes* | *Eggs* | *Other Specific Foods* |
|---|---|---|---|---|
| Ala. | tit. 14, § 211(d)[a] | | | §§ 82-918.3, .5[g] |
| Alaska | | | | |
| Ariz. | §§ 36-903, -904[a] | § 3-629 | §§ 3-710, -719, -723, -724, -733, -736 | § 3-628[f], §§ 3-446, -535[i] |
| Ark. | §§ 82.1102(1), -1103(e), -1105(a), (c), -1118(a), (b) | | | |
| Cal. | Health & Safety Code §§ 26208-26210, 26270, 26273, 26275, 26286, 26286.5, 26287, 26295[bc], §§ 26457, 26500, 26501, 26501.1, 26516, 26519, 26540, 26542[a] | Agric. Code §§ 647, 705, 706 | Agric. Code §§ 1103.4, 1105.7, 1107 | Agric. Code §§ 475, 480, 521, 617, 676, 4132[f], §§ 578, 582[h] |
| Colo. | | | § 7-11-3 | |
| Conn. | §§ 3930(m), (o), 3931(e), (j), (k), 3933(a), (b), (d), 3949, 3950 | | §§ 1283c, 3080 | §§ 3918, 3922[h] |
| Del. | | | tit. 3, §§ 3503, 6303 | tit. 16, §§ 3902-3904[i] |
| D. C. | §§ 10-101a, -124a | | | |
| Fla. | §§ 500.03(11), (12), (13), .04(5), (11), .05, .19(1), (2), .24(1), (3) | §§ 502.06, .27 | §§ 583.02(4), (5), .20(1) | §§ 503.07(2), (5), .10[h], §§ 534.44, .46, 583.13, .20[i] |
| Ga. | | | §§ 42-915, -9920 | |
| Hawaii | §§ 2203(1), (2), 2204(1), 2206(e), (k), 2207, 2219(a), (b), 2231(a), (c) | | § 1308 | § 11368[i] |
| Idaho | | | § 37-1514 | §§ 37-1201, -1202, -1202(b), -1204[h] |
| Ill. | | §§ 53.258, .260 | §§ 53.079(5), (6), (13) | §§ 53.286, .291[h] |
| Ind. | §§ 35-3102, -3103(1), (o), 3104(e), (k), -3105 to -3107, -3116 to -3118, -3120 | § 35-3704 | §§ 35-2254, -2263 | |
| Iowa | | § 191.5 | | |
| Kan. | §§ 65-656 to -659, -670, -672 | | § 2-2503 | |
| Ky. | | | | |
| La. | §§ 40:602, :611, :625, :626, :641 | | §§ 3:828, :829 | § 51:612[i] |
| Me. | c. 32, §§ 217, 218, 220[a] | | c. 32, §§ 41, 42 | |
| Md. | | | art. 48, § 157 | art. 43, § 192(a)[h], art. 27, §§ 196, 197[i] |
| Mass. | | c. 94, § 51 | c. 94, §§ 90A, 90B | c. 130, §§ 82, 92[i] |
| Mich. | § 288.41[e] | § 288.254 | §§ 289.304, .307-.310 | § 288.306[h], § 289.589[i] |
| Minn. | | §§ 33.01, .02 | | |
| Miss. | | | §§ 4435-24, -25 | |

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|---|---|---|---|---|
| Mo. | §§ 196.015(5), (11), .025(3), .150, 120 | § 196.720 | § 196.336 | |
| Mont. | § 3-1411[d] | §§ 27-522, -523 | | |
| Neb. | | §§ 81-292, -293 | | § 81-223[h] |
| Nev. | §§ 6206.01(h), (m), .02(d), .12 | | | |
| N. H. | c. 51, § 9-c | c. 184, § 53 | c. 342, §§ 2-6 | |
| N. J. | | § 2A:108.4 | §§ 4:3-3, -8, -11.0 | |
| N. M. | §§ 54-1-2(g), (h), -3(e), -5(c), -14 | | §§ 54-2-3(c), -9 | |
| N. Y. | Educ. Law §§ 6821(5), (11), 6823(1), (4), 6824[bc], Agric. & Mkts. Law § 202-a[a] | Agric. & Mkts. Law § 61 | Agric. & Mkts. Law §§ 160-c, -d | Agric. & Mkts. Law §§ 71-e, -g[h], § 160-k(1)[i] |
| N. C. | §§ 106-121(c)-(m), -122(e), (h), -124(c), -138 | | §§ 106-245.7(e), (f) | |
| N. D. | § 19-0905[c] | § 4-1840 | § 19-0704 | |
| Ohio | | | § 925.02 | § 3717.52(k)[h] |
| Okla. | tit. 63, §§ 266.2(k), (l), (m), .3(d), .5(c), .13[bc], §§ 180.2(i), .3(e), .5(c), .14[a], tit. 2, § 11.2[d] | | | tit. 2, § 7-104[h] |
| Ore. | §§ 616.205(1), .215(5), .265, .270, .275, .990[a], §§ 621.605, .610[e] | | §§ 632.100, .490 | §§ 621.357, .435[g], §§ 625.320, 632.316, .990[i] |
| Pa. | | tit. 31, § 800.12 | tit. 31, § 321 | |
| R. I. | § 21-28-16[b] | | §§ 21-17-5, -6, -7, -10 | § 21-19-6[i] |
| S. C. | | | § 66-626 | §§ 32-1704(1), -1716.5[h] |
| S. D. | | § 22.0513 | | § 22.0608[h], § 4.0911[i] |
| Tenn. | §§ 52-102(k)-(m), -103(e), (k), -120, §§ 69-515, -517[b], § 52-312(1)[e] | § 52-507 | § 52-206 | §§ 52-303(22)(k), -312(6)[f] |
| Tex. | | | | Civil Art. 165-3, § 4[f] |
| Utah | § 4-20-43, § 5-4-6(3)[d], § 5-3-12(e)[e] | | | § 4-20-63[g], § 4-23-9[i] |
| Vt. | | § 4664 | § 4715 | |
| Va. | §§ 54-464, -468, -469(4), -473(6)[bc], §§ 3-307(7), (8), -308(d), -309, -310[a], § 18-191[d] | | | § 61-69[i] |
| Wash. | §§ 69.04.016, .017, .019, .040(5), (11), (12), .050, .090, .710, .720, § 15.32.430[e] | §§ 15.32.340, 15.40.030 | § 69.24.200(2)(b) | § 15.32.420[f], § 69.16.160[i] |
| W. Va. | | | § 2034(1) | |
| Wis. | §§ 97.64, .65[a] | § 97.46 | | § 97.43(7)[f], §§ 97.58, .62[i] |
| Wyo. | | § 46-708 | § 46-905 | |

[a] Food
[b] Drug
[c] Cosmetic
[d] Agricultural products generally
[e] Dairy products generally
[f] Dairy products
[g] Imitation dairy products
[h] Frozen desserts
[i] Miscellaneous

TABLE 2. STATUTES GOVERNING ADVERTISING OF OTHER COMMODITIES

| | *Seeds* | *Other Agricultural Commodities* | *Alcohol* | *Other Commodities* |
|---|---|---|---|---|
| Ala. | | | tit. 29, §§ 5, 12, 29 | |
| Alaska | | | §§ 72-113(2b), (2c) | |
| Ariz. | §§ 3-231, -241, -242 | § 3-281[a] | § 4-243 | § 75-2405[l] |
| Ark. | § 77-320 | | | |
| Cal. | Agric. Code §§ 914(4), 914.5(2) | Agric. Code § 1042[a], § 1089[b] | Bus. & Prof. Code §§ 25611-25614, 25664 | Bus. & Prof. Code §§ 17532, 17534, 17535[i], §§ 21508, 21509[k], §§ 19150, 19220[l] |
| Colo. | | § 6-13-10[a] | §§ 75-2-3(19), (20) | |
| Conn. | §§ 3094(g), 3096(a)(3), (b)(2), 3100 | | § 4320 | |
| Del. | tit. 3, §§ 503(2)(3), (b)(2) | | | tit. 6, §§ 3705, 3706[k] |
| D. C. | | | | |
| Fla. | §§ 578.01(16), 13(1)(c), (2)(b), .25, .181 | | | §§ 726.10(4), (6)[k] |
| Ga. | §§ 5-2904(a)(3), (b)(2), -9951, -9953 | § 5-9952[f] | §§ 58-1022(f), -1040 | §§ 84-2704, -9946[k] |
| Hawaii | §§ 1354.01(g), .03(b), .10 | | §§ 7246, 7283 | |
| Idaho | | §§ 25-715, -718, -719[d] | §§ 23-607(1), -1013(9) | |
| Ill. | §§ 2.066(1)(c), .073 | §§ 5.020, .025[d] | § 68-051 | §§ 15.72, .73[k] |
| Ind. | | | | §§ 46-1205, -1207[l], §§ 58-1004, -1005[k] |
| Iowa | §§ 199.1(10), .8 | § 162.12[d] | §§ 123.47, 124.47, §§ 98.40, .41[g] | § 121.4[k] |
| Kan. | | § 2-1208[a], § 2-1011[b], § 47-708[d], § 47-510[e] | § 41-211, -714 | §§ 8-902, -903, -908[j] |
| Ky. | | | §§ 241.060, 242.250, 244.130, .140, .510-.540 | |
| La. | §§ 3:1445(3), (4) | § 3:1316[a], § 3:1896[b], § 3:1605[c], § 3:1966[d] | § 26:157 | |
| Me. | c. 32, §§ 232(I)(C), (II)(B) | | c. 61, §§ 36, 37, 54, 55 | |
| Md. | Art. 48, § 148 | | art. 2B, § 110 | art. 27, § 227[k] |
| Mass. | c. 94, §§ 261C(a)(3), (b)(2) | | c. 138, §§ 1, 24 | c. 94, §§ 295C, 295D[h] |
| Mich. | § 750.299 | § 287.203[d], § 290.303[f] | § 750.42 | § 445.554[k] |
| Minn. | | | §§ 340.09, .15, .94 | |
| Miss. | § 4398.05 | | §§ 2664-2665 | |
| Mo. | §§ 266.071(1)(3), .080(3)(d) | | | |
| Mont. | | | §§ 4-170, -358 | |

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|---|---|---|---|---|
| Neb. | §§ 81-2,136.01(7), -2,138.01(3), -2,139.01(2) | § 54-1007[d] | § 53-118(5) | §§ 66-313 to -315[h], § 81-2, 193[j] §§ 5035.02, .03a[h], § 1006.08[j] |
| Nev. | | | | |
| N. H. | c. 434, §§ 1(VIII), 5, 6 | | c. 175, §§ 10, 11 | c. 193, § 52[l] |
| N. J. | § 4:8-17.1 | | §§ 33:1-66, -75 | § 51:4-3[h], § 45:22-37[k] |
| N. M. | §§ 45-12-13(a)(3), (b)(2) | § 47-11-14[d] | | § 64-32-8[j], § 40-21-30[k] |
| N. Y. | Agric. & Mkts. Law § 142d | Agric. & Mkts. Law § 133a[b], § 103[d] | Alco. Bur. Control Law §§ 104(4), 105(18)(d), 106(7) | Pen. Law § 447(4)[k] |
| N. C. | § 106-283(b)(2) | | §§ 18-52 to -55 | § 66-33[k] |
| N. D. | | § 36-0317[d] | § 5-0107 | |
| Ohio | §§ 907.01(I), (T)(2), .02, .05, .06(A)(3), (B)(2) | §§ 3741.04(C), (D)[f] | §§ 4301.03(F), .22, 4303.05, .09 | § 3741.17[h] |
| Okla. | tit. 2, §§ 8-21(1), -23(a)(4), (b)(4) | tit. 2, §§ 8-69, -92(a)(2), (b)(2)[f], tit. 4, §§ 195, 218, 222, 226[d] | Const. Prohibition Ord., tit. 37, § 1 | tit. 15, § 614[k] |
| Ore. | | | §§ 471.730(7), .750 | § 695.240[k] |
| Pa. | tit. 3, §§ 279(6), 280(2) | tit. 3, § 667[e] | tit. 47, §§ 4-493(19), (20) | tit. 73, §§ 263-265[i], § 243[k] |
| R. I. | | | § 3-5-17 | § 31-17-13[h] |
| S. C. | | | §§ 4-6, -79, -103 | |
| S. D. | §§ 4.10A04(1)(c), (2)(b) | § 40.1707[d] | | |
| Tenn. | | | § 57-109[l] | |
| Tex. | Civil art. 93b, §§ 2(h), 4(a)(3), (b)(2) | Civ. art. 192-1, § 3(d)[e] | Pen. Code art. 667-14, 667-24(j), (l), 667-24a, 666-50 | Pen. Code art. 11371-2[k] |
| Utah | §§ 4-2-4(1)(b), (c), (2)(b) | § 4-10-11[b] | §§ 32-7-26, -27, § 76-11-1[g] | § 76-4-6[l], § 76-4-3[l] |
| Vt. | §§ 7809(III), 7810(II) | | §§ 6240, 8512, § 8512[g] | |
| Va. | §§ 3-209(14), -211(I)(a)(3), (III) | | §§ 4-69, -103 | § 18-192[h], §§ 59-159, -160[k] |
| Wash. | §§ 15.48.010(8), .060(3), .070 | § 15.56.090[c] | | § 19.60.090[k], § 46.48.060[l] |
| W. Va. | §§ 2097(h), 2100(a)(3), (b)(2) | § 2032[d] | §§ 5907(22), (41), (88)(b) | § 5990(½)[k] |
| Wis. | §§ 94.38(9), .40(6) | § 95.07[d] | §§ 66.054(9), 176.18(9) | § 100.18(6)[h], § 125.15[k], § 100.18(3)[l] |
| Wyo. | | § 56-1405[d] | | |

[a] Fertilizer
[b] Animal feed
[c] Poisons and pesticides
[d] Stallions and jacks
[e] Livestock remedies
[f] Other
[g] Tobacco
[h] Gasoline and fuel oil
[i] Coal
[j] Antifreeze
[k] Second-hand watches
[l] Miscellaneous

## TABLE 3. STATUTES GOVERNING FALSE AND MISLEADING ADVERTISING

| | *Printers' Ink Statute* | *Special Provisions* |
|---|---|---|
| Ala. | tit. 14, § 211 | |
| Alaska | | |
| Ariz. | § 44-1481[b] | § 44-1423[d] |
| Ark. | | |
| Cal. | Bus. & Prof. §§ 17500, 17500.1, 17534-17535[a] | Pen. Code § 2886, 2887, 2890[e], Bus. & Prof. Code §17531[i], §§ 17531.5, 17533.5[g], § 17534[gi], § 17535[gik] |
| Colo. | §§ 40-15-1, -2 | |
| Conn. | § 8703 | |
| Del. | | tit. 6, §§ 2501, 2503[h] |
| D. C. | §§ 22-1411, -1413 | |
| Fla. | § 817.06[b] | |
| Ga. | | |
| Hawaii | §§11373, 11374 | § 11373[cd], § 11374[k], § 11375[i] |
| Idaho | § 18-3112 | |
| Ill. | § 37.195 | |
| Ind. | § 10-2110 | §§ 35-4016, -4017[i] |
| Iowa | § 713.24 | |
| Kan. | §§ 21-1112 to -1114 | |
| Ky. | § 434.270 | |
| La. | § 51:411 | |
| Me. | c. 133, § 29[b] | c. 133, § 29[d] |
| Md. | art. 27, § 195[a] | art. 27, § 198[d] |
| Mass. | c. 266, § 91[a] | c. 266, § 91A[d] |
| Mich. | § 750.33 | § 750.33[d] |
| Minn. | § 620.52 | |
| Miss. | | |
| Mo. | § 561.660 | |
| Mont. | §§ 94-1818 to -1821 | |
| Neb. | §§ 28-1235, -1236 | |
| Nev. | § 10529 | |
| N. H. | c. 580, § 9[a] | |
| N. J. | | |
| N. M. | | |
| N. Y. | Pen. Law § 421 | Pen. Law § 421-a[f], § 421-d[g] |
| N. C. | § 14-117[b] | |
| N. D. | § 51-1201 | |
| Ohio | §§ 2911.41, .42 | § 2911.42[k] |
| Okla. | tit. 21, § 1502 | |
| Ore. | § 646.810 (1) | § 646.210 (b)[d], § 646.820[g], § 646.840[e] |
| Pa. | tit. 18, 4857[a] | tit. 18, § 4857[cf], tit. 69, § 162[h] |
| R. I. | §§ 11-18-10, -11 | § 11-18-12[k] |
| S. C. | § 66-3[b] | |
| S. D. | § 13.4201[a] | § 13.4201[c] |
| Tenn. | § 39-1910[a] | § 39-1945[d], §§ 6-714, -720, -724[h] |
| Tex. | Pen. Code art. 1554[a] | Pen. Code art. 1037 (G)[c], art. 141[j] |
| Utah | § 76-4-1[a] | § 13-5-8[d], § 76-4-2[f], § 76-4-4[i], § 76-4-5[h], § 76-36-1[e] |
| Vt. | § 8324[a] | |
| Va. | § 18-189 | § 18-190[g], §§ 18-189, 54-815[h] |
| Wash. | § 9.04.010 | |
| W. Va. | § 5979 | |
| Wis. | § 100.18 | § 100.18 (3)[f], § 23.25[j], §§ 100.18, 20.21[k] |
| Wyo. | § 9-904 | § 37-1603[h] |

[a] Knowledge required
[b] Deceit required
[c] Misrepresentation of value
[d] Bait advertising
[e] Misrepresenting producer
[f] Misrepresenting dealer
[g] War surplus or military goods misrepresentation
[h] Fire or bankruptcy sales misrepresentation
[i] Not stating defective goods
[j] Miscellaneous
[k] Injunction provisions